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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

JESSE H. DENTON,
Petitioner,

vs.

No. 242.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

This is a suit by petitioner Denton against The Yazoo & Mississippi Valley Railroad Company, the Illinois Central Railroad Company and Jim Hunter, a negro porter, to recover damages on the ground that petitioner, a railway mail clerk, was injured through the negligence of Hunter while he and Hunter were jointly engaged in loading sacks of mail on a railway mail car at Jackson, Mississippi—he being in the car and Hunter on the mail truck (p. 38). There was a judgment for petitioner against all three defendants for $12,000. On appeal to the Supreme Court of Mississippi, the judgment was affirmed as to Hunter but

reversed as to the two railroad companies and the suit dismissed as to them. The case is now here by certiorari.

Among other defenses, the railroad companies set up the proposition that, while engaged in the work of loading, Hunter was a servant of the federal government and for his negligence they were not responsible. In other words, the defense was the "lent servant" doctrine—this pursuant to the postal regulation presently to be quoted to the effect that the railroad companies should furnish the men necessary to load the mails into the cars "under the direction of the transfer clerk or clerk in charge of the car." The State Supreme Court sustained this defense and held that Hunter was, *pro hac vice,* the servant of the federal government and not of the carriers (pp. 222-224).

Yazoo etc. R. Co. v. Denton, 133 So. Rep. 656.

BRIEF.

1. "All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States *in the manner, under the conditions, and with the service prescribed by the Postmaster General.*"

   29 Stat. 429, Sec. 5, subd. 27.

   39 U. S. Code Ann., Sec. 541.

2. Pursuant to this authority, the Postmaster General promulgated, among others, this regulation:

> "Railroad companies shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of the railway postoffice cars and to load and pile the mails in and unload them from

storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty."

U. S. Postal Regulations, Sec. 1293, par. (2).
Record, p. 168.

3. The regulation just quoted required nothing further of the carrier than that it furnish the men necessary for the purposes indicated and expressly provided that such men, in the performance of that work, should be "under the direction of the transfer clerk or clerk in charge of the car, if one is on duty." This placed in the clerk, a representative of the Government, the right and the duty to direct the man furnished by the carrier and, by clear implication, excluded any right in the carrier to direct or control him while in that work.

Infra, pp. 5, 12, 13.

4. The record affirmatively shows that at the time of the injury there were in the mail car both a transfer clerk and a clerk in charge of the car. As to this, there is no controversy.

Record, pp. 40, 137.

5. "Under the direction of the clerk" indicated authority in the clerk, and in him alone, to dictate to the man furnished by the carrier how he should do the work of loading.

Infra, p. 15.

6. The injury resulted from the manner in which Hunter, the porter, standing on the mail truck, was placing the sacks of mail into the mail car where they were received and placed by the plaintiff.

Record, pp. 38-39.

7. The porter, Hunter, was, while doing this work, the servant of the federal government and not of the carrier, wherefore the doctrine of lent servant applies.

Record, pp. 137, 223.
Y. & M. V. R. Co. v. Denton, 133 So. Rep. 656.
Standard Oil Co. v. Anderson, 212 U. S. 215.
Linstead v. C. & O. R. Co., 276 U. S. 28.
Harrell v. Atlas Co. (C. C. A.), 250 Fed. 83.
Burgess v. Standard Oil Co. (C. C. A.), 262 Fed. 767.
Isaacs v. Prince, 133 Miss. 205.
Carr v. Burke, 131 N. Y. App. Div. 361.

ARGUMENT.

The opinion of the State Supreme Court (Rec., pp. 216-224; 133 So. Rep. 656) is forceful and we offer it as a part of our argument.

A review of the federal statutes and of the postal regulations makes clear the respective duties of the government and of the carriers in the handling of mails. The carriers' primary duty is that of transportation, including the furnishing of transportation facilities. The government's primary duty is that of handling the mail while it is in the mail car and after transportation is complete. Intermediate between these primary duties is the matter of loading, and the regulation just quoted makes it clear that there is no duty on the part of the carrier to load the mails into the car, but merely to furnish the men necessary for that purpose, those men to work under the direction of the clerk in charge of the car.

The practical construction placed by the government and the carriers alike upon these regulations—exhibited in the case at bar—is that, in the work of loading mail sacks into the car, the man furnished by the carrier shall be on the outside of the car and hand up the mail sacks to the government clerk who is in the car. As to how this shall be done, the man furnished by the carrier is entirely under the direction and control of that clerk.

This being true and there being no contemplation whatever that the carrier shall superintend or direct the work of the men it is required to furnish, it necessarily follows that the porter in the case at bar was the servant of the

government and not of the railroad company during the work of loading. He could have had no instructions from the carrier as to the manner of doing the work *except to obey the directions of the mail clerk.* And such is the testimony here. The carrier's station master said:

"Q. When he (Hunter) was loading and unloading the mail down there in the car, under whose direction and supervision was he?

A. The transfer clerk and the clerk in the mail car in the United States post office.

Q. Did you leave it to them as mail men to control him and direct him how he should load and unload the mail?

A. Yes, sir.

Q. All the details of that work, the supervision of it, how he did it and what he did, which he loaded first, and how fast he loaded it, did you have any, or did you attempt to exercise any control over that at all?

A. Not a bit in the world. I am busy at other points and I don't stay at one mail car."

Record, p. 27.

Hunter, the porter, testified:

"Q. If you have two or three different kinds of mail on your truck, pouch mail, sacks of mail, boxes, parcel post, and you start to loading one kind, say you start to loading a sack of mail first, and this man tells you to wait, Jim, 'I want you to load that pouch mail first,' do you have to do that?

A. I have to do just what that man tells me to do, the man standing in the car.

Q. Whatever the man in the car tells you to do, that is what you do?

A. Yes, sir.

Q. You do that all the time?

A. Yes, sir.

Q. The man in the car there is your boss so far as loading that mail?

A. As long as I am loading that car, he is my boss."

Record, p. 165.

The case of Standard Oil Co. v. Anderson, 212 U. S. 215, is, with the exception of Driscoll v. Towle, 181 Mass. 416, the sole authority relied upon by the petitioner here. In that case this court refused to apply the lent servant doctrine but the decision rested upon the peculiar facts involved. Plaintiff there was a longshoreman employed by T., a master stevedore, who, under contract with defendant, Standard Oil Co., was engaged in loading a ship with oil. While working in the hold, he was, without fault on his part, struck and injured by a load which was unexpectedly lowered by a winchman. The accident happened because the winchman negligently failed to observe certain signals. The question, therefore, was whether the winchman was, at the immediate moment, a servant of the defendant, the owner of the vessel, or of the stevedore who had contracted to load it. It is quite important to note that the work out of which this accident happened *was that of*

hoisting. After reciting this situation and reviewing the authorities, the Court said:

> "Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control, or was he rather engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do *the work of hoisting* itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, *under its own control.*"
>
> Standard Oil Co. v. Anderson, 212 U. S. 225.

Manifestly that situation is not analogous to that here presented.

In Driscoll v. Towle, 181 Mass. 416, the defendant had agreed with the Electric Light Company to perform certain transportation for the latter by horse and wagon and, to that end, furnished horse, wagon and driver. While hauling material of the Light Company to a destination indicated by it, the driver injured the plaintiff. The Court held the defendant liable, declining to apply the lent servant doctrine on the ground that while the Light Company had the right to tell the driver what material he should carry and to what destination, the driver remained "*subject to no orders but those of the man who pays him.*" The Court added:

> "Of course, in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way and the orders which he receives simply point out to him the work which he or his master has undertaken to do."

In other words, the defendant there was really an independent contractor with respect to certain services to be rendered the Light Company, the latter having no right of control beyond indicating the service it desired. A different result would have followed if the contract between the defendant and the Light Company had expressly provided that, while driving the wagon, defendant's servant should be accompanied by and be under the direction of the representative of the Light Company.

In the case at bar, the obligation of the carrier was merely to furnish men who, as to the manner of doing the work in question, were subject to the orders of the railway mail clerk alone. That clerk was at the scene—no representative of the carrier was present.

The instant case is more like that of Linstead v. C. & O. R. Co., 276 U. S. 28. There, Linstead was a conductor in the employ of the "Big Four" Railroad but at the time of his injury was working on a freight train running on the tracks of the C. & O. Railroad. Suit for his death was brought against the latter company and the question in the case was—for whom was he working when killed, the C. & O. or the Big Four? He was a conductor regularly in the employ of the Big Four but, by an arrangement between the Big Four and the C. & O., the Big Four lent to the C. & O. a locomotive, caboose and train crew to take freight trains from Stevens, Ky., to Riverside, Ohio, over the rails of the C. & O., and paid therefor by reciprocal service. When the Big Four train crew ran on the track of the C. & O. they were under the supervision and control of the train master of the C. & O. The Big Four train crew *were not subject to discharge by any officer of the C. & O. and were paid by the Big Four.* While running as conductor on the track of the C. & O., under the conditions stated, Linstead was killed in a collision between his train and another train of the C. & O. Dealing with these facts, the Court pointed out that the work being done

> "was work done under the rules adopted by the Chesapeake & Ohio Railway Company; and it was done under the immediate supervision and direction of the trainmaster in charge of the trains running from

Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. *We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being servants of the Chesapeake & Ohio Company for the performance of this particular job.*"

Linstead v. C. & O. Ry., 276 U. S. 34.

In Harrell vs. Atlas Cement Co. (C. C. A.), 250 Fed. 83, the railroad company was transporting rock from the cement company's quarry to its plant, and employes of the railroad company who took loaded cars from and emptied cars to the quarry, particularly over the track of the cement company, worked in conjunction with that company's servants in loading and removing the cars. All were under the direction of the cement company. The Court, in an opinion by Judge Sanborn, held that railway employes, though hired and paid by the railroad company, were, in the course of such work, to be regarded as servants of the cement company and fellow servants of the employes of that company. The case of Standard Oil Co. v. Anderson, 212 U. S. 215, was reviewed and the Court pointed out that the holding of that case would not apply for the reason that in the instant case "the cement company had and was exercising the exclusive power to control and direct how, when and where he (plaintiff) should do his work."

Harrell v. Atlas Cement Co., 250 Fed. 83.

This, we say, is a sufficient answer to the argument of petitioner based on the fact that the defendant carriers here employed Hunter, paid him, and alone had the right to discharge him.

The determinative point here is that, at the time of the injury, Hunter was working under the direction and control of the Post Office employes who, under Post Office regulations, had the sole right to direct and control him while loading sacks of mail into postal cars. The evidence shows that in the loading of mail into postal cars, Hunter, as a matter of fact, was directed and controlled solely by the Government's representative, the clerk in the car. The carriers maintained no one of their officers or agents at the mail car to supervise and direct the work of Hunter. This was left to the Post Office clerk in the car. In other words, not only did the postal regulations require the clerk to supervise and direct Hunter and to control him, but this was also the actual practical construction and application of the postal regulations.

Whose was the work here to be performed? It was the handling of mail, the work of the federal government—pursuant to express constitutional authority and to a duty imposed by Congress. The government, through the agency of its Postmaster General, had expressly directed that the duty of the carrier in regard to loading was merely to furnish men to work with and under the supervision of the government clerk in the car—thus, by clear inference, withdrawing such men for the time being from the service and control of their regular master and subjecting them solely to the control and direction of the government clerk in charge of the car.

PETITIONER'S PROPOSITIONS REVIEWED.

1. The brief for petitioner, at pp. 7-13, cites sections of the Revised Statutes (U. S. Civ. Code Ann., secs. 531, 533, 538 and 541), which deal with the carrying of mail by rail-

way carriers, and secs. 1286, 1288 and 1293 of the Postal Regulations. From these the argument is made that the whole matter of transportation of mail, including the loading and unloading of mail, is a duty resting solely upon the railway carriers and that every employe taking part therein is the servant of the carrier alone.

The vice of that argument lies in the fact that, with respect to *the loading of mails,* the Postal Regulation (sec. 1293, par. 2), is specific—not that the railway carriers shall load the mails but that they shall merely "furnish the men" necessary to that end. And it is specifically required that, in doing the work of loading, those men shall be under the direction of the clerk in charge of the car. Superintendence or direction by the carrier is excluded —by a clear implication.

The rule is that general regulations must yield to specific provisions. And the practical construction of these regulations indicates clearly the idea that the man supplied by the carrier for work in conjunction with the clerk in the car shall be under his supervision, direction and control and his alone.

> "The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant.*"
>
> Ex parte Crow Dog, 109 U. S. 556.

2. The argument is made for petitioner that the statute (5 U. S. Civ. Code Ann. 365) requires "all persons employed in the postal service" to take an oath; that Hunter, the porter here, took no oath, wherefore he was no employe of the Post Office Department.

Aside from the fact that the record is silent as to whether Hunter took an oath or not, the proposition advanced can not be sound. This may well be illustrated by the Linstead case, 276 U. S. 28, reviewed supra. Linstead was a conductor and was held to have been a servant of the C. & O. as to the work then being done by him. It is entirely probable that he had never qualified as a conductor under the rules and regulations of that company. If that failure to qualify had appeared in the case, it would have made no difference in the conclusion reached.

The oath is required only of those who are on the Government pay roll. Assuming a state of facts making a clear case for the application of the "lent servant" doctrine in all other respects, it could not be that the doctrine would be refused application merely because the servant in question had not taken the oath.

3. "The loaned servant doctrine can have no application to the case at bar because Jim Hunter, the porter, was the admitted servant of the respondent railroad companies and was doing the very work he was employed by them to do, and for which they were paid by the United States Government. It was the sole duty and obligation of the respondent railroad companies to load and unload United States mail."

Brief for Petitioner, p. 11.

This utterly ignores the plain wording of the regulation in question (sec. 1293, par. 2), which specifically provides that the railroad companies "shall furnish the men necessary to handle the mails, to load them into and receive them from the doors of railway post office cars . . . under

the direction of the transfer clerk or clerk in charge of the car." That provision does not contemplate that the railway carrier shall attend to the loading of the mails or shall supervise or direct that work. Indeed, any right on the part of the carrier to supervise or direct its men in that work is plainly negatived.

4. An argument is made for petitioner that the word "direction" in the phrase occurring in Sec. 1293 of the Postal Regulations (p. 168) to the effect that the carriers must furnish men necessary to "load and pile the mails in and unload them from storage and baggage cars, under the direction of the transfer clerk or clerk in charge of the car if one is on duty," means merely the right to "point out" or "indicate" the work to be done. The case of Hinds v. Kellogg is cited. That case involved a construction of a New York statute providing that the referee's report shall "direct the judgment to be entered thereupon." The Court said:

> "This does not comprehend an instruction or command to a person whose duty it is to enter judgment to perform that duty. The word 'direct,' as used in this connection, is synonymous with the words 'to point out,' 'to guide,' 'to show,' 'to regulate.'"
> Hinds v. Kellogg, 13 N. Y. Supp. 923.

That case, manifestly, involved no question of the control or direction of a man doing work for another. A more pertinent ruling is that of the Illinois Court to the effect that "one of the accepted meanings of the word 'direction' is 'the act of governing, ordering or ruling.'"
Kellyville Coal Co. v. Bruzas, 223 Ill. 600.

This Court has had occasion to consider the meaning of the word "direction" in dealing with the requirement of the statute that the Commissioner of the General Land Office is to "perform under the direction of the Secretary of the Interior all duties appertaining to the surveying and sale of the public lands," etc. The Court said:

> "The phrase 'under the direction of the Secretary of the Interior,' thus used in these statutes, as was said by Mr. Justice Lamar, speaking for this court, 'is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department, of which he is the head."
> Warner Stock Co. v. Smith, 165 U. S. 34.

The word "direction" as used in the phrase "under the direction of the . . . clerk in charge of the car" is synonymous with "orders" or "control." A single car was in contemplation and the work being done was that of transferring the mails from a small truck to the mail car. There was but one opening—a narrow one—in the door of the car for that purpose (p. 139). It follows that there was no respect in which the porter could be directed by the mail clerk except as to the manner of handing up the bags. There was no room for direction as to where the porter should go, what packages of mail he should get for handling or in what car or in what door of the car he should place them. The regulation contemplated, necessarily, that the process of loading would involve the placing of the sacks in the car by the porter for further handling by the clerk. Nothing was left, therefore, for the clerk to do in the way of direction except to dictate the

manner in which the sacks of mail should be handed in. That was his right and duty *and his alone.*

It cannot be true that the carrier is responsible for the manner in which Hunter did his work of loading when the right to supervise and direct that manner had, by an express regulation of the government, been withdrawn from the carrier and placed in the postal clerk in charge of the car.

We respectfully ask, therefore, that the judgment of the court *a quo* be affirmed.

Respectfully submitted,

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(All italics are ours.)